IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 22, 2004 Session

KENNETH STINNETT, ET AL v. DUDLEY D. JOHNSTON, ET AL.

Appeal from the Chancery Court for Bledsoe County
No. 2730 Honorable Jeffrey F. Stewart, Judge

No. E2003-02908-COA-R3-CV - FILED OCTOBER 19, 2004

This appeal involves an acreage deficiency in the conveyance of a subdivision lot. Both parties to the transaction believed that the lot contained 2.4 acres. However, a survey after the sale determined that the lot contained only .93 acres. The parties did not learn of the acreage discrepancy until after the buyer had constructed a house foundation which extended approximately 15 feet across the boundary line onto a neighbor's property. The trial court determined that there had been a mutual mistake as to the quantity of land conveyed and ordered a rescission of the transaction. The trial court awarded the buyer damages in the amount of $17,275.60 representing a refund of the purchase price, reimbursement for grading, labor, construction materials, and closing costs for the house construction loan. The seller appealed. We affirm the trial court's decision to rescind the transaction based upon mutual mistake, but modify the award of damages.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed As Modified; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Lynne Denell Swafford, Pikeville, Tennessee, for the Appellants, Dudley D. Johnston and Robert E. Johnston.

J. Arnold Fitzgerald, Dayton, Tennessee, for the Appellee, Kenneth Stinnett and wife, Rebecca S. Stinnett.

OPINION

On May 23, 1996, the Appellants herein, Dudley Johnston and Robert Johnston, ("Seller") acquired a subdivision lot located in Bledsoe County which they believed contained 2.4 acres of land. This belief was based on information obtained from the Bledsoe County Tax Assessor's office which stated that the lot contained 2.4 acres. Dudley Johnston subsequently heard that Kenneth Stinnett ("Buyer")was interested in purchasing some property. Dudley Johnston went to Kenneth Stinnett and advised him that he had 2.4 acres for sale. Dudley Johnston and Kenneth Stinnett

viewed the property, on which Dudley Johnston had a sign advertising the property as containing "2+ acres." There were no visible markers establishing the corners. Dudley Johnston pointed out one fixed corner which was the intersection of two roadways and generally pointed out the other two corners. The parties did not walk the lines or measure the boundaries.

Thereafter, on June 22, 1999, the owners of the property, Dudley Johnston and Robert Johnston, executed a warranty deed to Kenneth Stinnett for the subdivision lot for the consideration of $7,500.00. The deed described the property by metes and bounds and made no representation as to acreage. Thereafter, Kenneth Stinnett and his wife, Rebecca Stinnett, began construction of a house on the property. While the house was under construction, Dudley Johnston stopped by the construction site. Mr. and Mrs. Stinnett testified that Dudley Johnston said that it looked like the house was right in the middle of the property. Dudley Johnston did not recall making this statement, but did recall commenting that the Stinnetts had a nice building spot. Dudley Johnston testified that he thought that the house was being constructed on the property conveyed to Kenneth Stinnett. Shortly after the grading work had been completed and the foundation was constructed, a survey was performed. It was at this point that the parties learned that the property contained only .93 acres and that the partially constructed house extended approximately 15 feet across the property line. According to Kenneth Stinnett's testimony at trial, the partially constructed house foundation was of no use and whoever ended up with the property would have to remove it.

On March 14, 2001, suit was filed by the Buyer[1] against the Seller alleging misrepresentation and seeking rescission and reimbursement for the purchase money plus all funds expended on the property. The Defendants answered the complaint denying liability and asserting that the Buyer should have located the corners and lines before making any improvements thereon.

Following a bench trial on June 5, 2003, the trial court ruled that there had been a mutual mistake concerning the amount of land offered for sale and there had been a substantial deviation from what the parties thought was for sale and what was actually conveyed to the purchasers. Accordingly, the trial court ruled that the transaction should be rescinded. At a subsequent hearing on July 24, 2003, the trial court awarded the Buyer damages in the total amount of $17,275.60 based upon a refund of the purchase price in the amount of $7,500.00, reimbursement for grading and excavation cost in the amount of $655.00, reimbursement for labor in laying blocks in the amount of $402.65, reimbursement for blocks in the amount of $625.00, reimbursement for lumber and building materials in the amount of $5,139.00, and reimbursement for loan closing costs for the house construction in the amount of $2,953.95. Upon payment of the judgment by the Seller, the Buyer was ordered to execute a deed conveying the property back to the Seller.

[1]The buyer of the property was Kenneth Stinnett. However, Kenneth Stinnett and wife, Rebecca Stinnett filed suit seeking rescission and damages. For the sake of convenience and clarity, both Kenneth Stinnett and Rebecca Stinnett are referred to in this opinion as "Buyer".

On appeal, the Seller argues that the trial court erred in finding that there had been a mutual mistake[2] and erred in its award of damages.

In this non-jury case, our review is *de novo* upon the record of proceedings below, but the record comes to us with a presumption of correctness as to the trial court's factual determination which we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville,* 898 S.W.2d 177, 181 (Tenn. 1995). The trial court's conclusions of law are accorded no such presumption. *Campbell v. Florida Steel Corp*., 919 S.W.2d 26, 35 (Tenn. 1996).

When the Seller acquired the property without the benefit of a survey in 1996, the Seller believed that the property contained 2.4 acres based upon information obtained from the Bledsoe County Tax Assessor's office. The Seller posted a sign on the property stating that the property contained "2+ acres." The Seller represented to the Buyer that the property contained 2.4 acres. When the Buyer acquired the property, he thought it contained 2.4 acres based upon the representations of the Seller. However, the property contained only contained .93 acres based upon a survey obtained after the sale. It is clear that both the Seller and the Buyer were mistaken as to the quantity of land being conveyed. This appears to have resulted from a simple mistake rather than any intentional misrepresentation or fraud.

Rescission of a contract may be ordered upon the ground of mutual mistake. *Atkins v. Kirkpatrick*, 823 S.W.2d 547 (Tenn. Ct. App. 1991); *Wilson v. Mid-State Homes, Inc*., 53 Tenn. App. 520, 384 S.W.2d 459, (Tenn. Ct. App. 1964). To justify rescission of a contract, the character of the mistake must be such as to result from unconscious ignorance or forgetfulness of a fact material to the contact or transaction. Whether a mistake is material to the transaction is a question that depends on the facts and circumstances of each case. *Robinson v. Brooks*, 577 S.W.2d 207, 209 (Tenn. Ct. App. 1978). It has been held that mistakes as to quantities and boundaries of land are material mistakes justifying rescission. *Isaacs v. Bokor*, 566 S.W.2d 532, 541 (Tenn. 1978).

In this case, it is evident that both parties were mistaken as to the location of the boundaries and the size of the lot. Both parties believed that the lot contained in excess of two acres, when in fact, it only contained .93 acres. Both parties believed that the house was being constructed on the property conveyed, when it fact, its foundation extended approximately 15 feet across the boundary line. Thus, the mistake as to the location of the boundaries and the size of the lot was mutual and was material to the contract. Accordingly, there was abundant proof to support a finding by the trial court that the Buyer was entitled to a rescission of the warranty deed.

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[2]Seller denied a mutual mistake in its answer and argues against a finding of mutual mistake in its brief before this Court. However, Seller's counsel in opening statement to the trial court said, "I would concede at this point that they are entitled to residual [sic] and get their money back because it was a mutual mistake, that is all we are talking about." Although Seller is bound by this concession, *Tamco Supply v. Pollard*, 37 S.W. 3d 905 (Tenn. Ct. App. 2000), nevertheless, we will address the issue of mutual mistake in this opinion.

The remaining issue concerns the amount of damages which the Buyer is entitled to receive. Clearly the Buyer is entitled to receive a refund of the $7,500.00 purchase price. The real issue is how much of the funds expended on the construction of the house should the buyer recoup?

Our Supreme Court in *Isaacs v. Bokor*, 566 S.W.2d 532 (Tenn. 1978) considered this issue and reviewed a series of rescission cases dating back to the 1800's. The Court concluded that whereas a purchaser who has been the victim of either fraud or mistake upon rescission, is allowed to recover the purchase price, it does not necessarily follow that the purchase price is the only amount which can ever be recovered by the injured party. The Court said:

> ...it is too narrow a view to state that a vendee, upon rescission, is limited strictly to the purchase price which he paid for the property. When he has changed his position and made improvements, he may well be entitled to recover for their value, although, in attempting to restore the parties to their former status, courts may require the vendee to account to the vendor for the use or rental value of the property, to convey improvements to him, and to restore to the vendor anything of value which the vendee has received from him in the rescinded transaction. *Id. at 540*.

Therefore, the Buyer may be entitled to receive more than a refund of the purchase price depending on the facts before the court. Where improvements have been made to the property by the vendee, it seems that a threshold determination must be made as to whether the improvements have value or enhanced the value of the property.

We respectfully disagree with the trial court's decision in this case to allow the Buyer to recoup all documented construction expenses and construction loan expenses incurred by him. Where a deed is rescinded and the Buyer has expended sums to improve the property, clearly in some cases, it would be appropriate and equitable for the Seller to pay the Buyer for the improvements since the Seller will ultimately benefit from these improvements. However, in this case it appears that the improvements did not benefit the property and may have to be removed at the expense of the Seller once the property is reconveyed to him.

This case arose as a result of a mutual mistake and, unfortunately, it is not possible to put both parties back in the position that they were in prior to the transaction. The Buyer incurred expenses for a foundation that is useless and does not improve the value of the property. The Seller will own a subdivision lot encumbered by a useless foundation that will have to be removed before any structure is built on the lot. Both parties have sustained a loss as a result of the mistake.

Accordingly, we hold that under the particular facts of this case, the Buyer should only be allowed to recover from the Seller the amount of this purchase price since the funds expended by the Buyer for construction of the foundation did not enhance the value of the property and is of no benefit to the Seller.

Accordingly, we affirm the trial court's decision to rescind the transaction based upon mutual mistake and modify the award of damages to the Buyer to the amount of $7,500.00, plus prejudgment interest from the date the Buyer paid the purchase price to the Seller. We tax the costs of this appeal to the Defendants for which execution may issue, if necessary.

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SHARON G. LEE, JUDGE